

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DANNY C. SHACK, JR., as Parent :
and Guardian Ad Litem for :
J. SHACK, minor :
:
vs. :
:
COOPER TIRE & RUBBER COMPANY : 2:16 CV 3711
:
TAMARA L. MOORE :
:
vs. :
:
COOPER TIRE & RUBBER COMPANY : 2:16 CV 3716

Motion Hearing in the above matters held Wednesday,
May 30th, 2018, commencing at 10:05 a.m., before the
Hon. David C. Norton, in Courtroom III, United States
Courthouse, 83 Meeting St., Charleston, South Carolina,
29401.

APPEARANCES:

RONNIE L. CROSBY, ESQ., P.O. Box 457, Hampton,
SC, appeared for plaintiffs.

LAURA W. JORDAN, ESQ., P.O. Box 7368, Columbia,
SC, appeared for defendant.

REED T. WARBURTON, ESQ., 1819 Fifth Ave. North,
Birmingham, AL, appeared for defendant.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
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1 THE COURT: Okay. I'm ready when y'all are.

2 MR. WARBURTON: Good morning, Your Honor, may it
3 please the Court, Tom Warburton here for Cooper tire. This is
4 two cases consolidated for discovery before Your Honor. All
5 plaintiffs are represented by Mr. Crosby. Ms. Jordan and I
6 represent Cooper Tire. We have two motions pending before you
7 noticed for hearing this morning, the first being Cooper
8 Tire's and the second the plaintiffs'.

9 Some discussion of the facts of the case and procedural
10 history is necessary to resolution of these matters. Shall I
11 just say, if I get too granular, I'll count on the Court to
12 tell me to quit, okay?

13 These are two product liability cases arising from an
14 August 2013 accident. The plaintiffs' family, in fact, 11
15 related passengers were traveling in a Ford Econoline van
16 equipped to carry seven folks. The van was rented from a
17 Virginia company called Virginia Auto Rental out of Virginia
18 Beach, Virginia.

19 And they all were involved in the accident on the highway.
20 The plaintiffs in these cases allege that the accident was
21 caused by a tire manufactured by my client, Cooper Tire, in
22 2008.

23 Discovery has yielded that that tire, along with the other
24 tire that was on the rear axle of the van on the accident day
25 were purchased, used, meaning they had been on a predecessor

1 vehicle, and driven for some unknown amount of time/distance,
2 and then taken off and then resold to Virginia Auto Rental.

3 In fact, what we call the companion rear tire, which would
4 be on the other side of the rear axle, failed tread and tire
5 belt separation 15 minutes before the accident.

6 Ms. Shack, who was driving, pulled over without incident
7 on that tire, but then 15 minutes later, the tire that the
8 plaintiffs allege is defectively designed and manufactured in
9 these cases, also failed. The trooper that responded has
10 testified that the crash was not caused by the tire but was
11 caused by driver error.

12 These were originally -- the plaintiffs originally brought
13 suit in Virginia against Virginia Auto Rental. They sued both
14 that company and the driver, Jacqueline Shack, their relative,
15 for negligence arising out of the accident, both in the
16 driving and in the maintenance and rental of the van.

17 They settled those negligence claims. They then brought
18 claims in South Carolina in Dorchester County, six original
19 actions. Cooper Tire brought those cases by removal to this
20 Court in November of 2016.

21 The parties immediately agreed to consolidate all such
22 cases for discovery. The Court entered its standard
23 conference and scheduling order. There were two amendments to
24 that, that are not material here. Those took place in 2017,
25 in February and in May.

1 In mid 2017, the parties, by stipulation, by agreement,
2 agreed to voluntarily dismiss all but two of the cases, those
3 now pending before this Court.

4 Postdismissal, the parties agreed and requested by joint
5 request, an amended scheduling order. That's ECF No. 21.
6 That is the one that is now material and now active pending
7 plaintiffs' motion on it. It was entered as ECF No. 22. And
8 I'm citing to what we have been designating the lead case, the
9 Shack action, Your Honor. That scheduling order set
10 deadlines, those of which are material here, for February.
11 The deadline for plaintiffs to identify proposed expert
12 witnesses, March; the deadline for fact discovery to conclude
13 in April, all in '18, the deadline for Cooper Tire to identify
14 its experts.

15 Prior to the close of fact discovery, Cooper Tire noticed
16 and took 14 fact witness depositions in four states.
17 Plaintiffs did not notice or take any depositions. The
18 parties exchanged written discovery, primarily taking place in
19 2017. And in connection with that, the topic of a protective
20 order to govern Cooper Tire's trade secret documents, the
21 confidential documents describing and depicting its
22 manufacturing and design processes specifications, et cetera,
23 was raised. Cooper Tire raised that in responding timely to
24 plaintiffs' request for production and interrogatories. The
25 plaintiff ultimately responded that it was unwilling to agree

1 to a form of protective order that Cooper Tire had proposed,
2 and Mr. Crosby on behalf of various plaintiffs had accepted
3 myriad times, both before this Court as well as before the
4 State Courts in South Carolina. And it is the form protective
5 order that Cooper Tire proposes, and something on the order of
6 90 percent of the time is agreeable. When not agreeable, it
7 results in motions such as the one that Cooper Tire has filed
8 to you, Judge, which is a request that the Court enter its
9 standard protective order to govern the trade secret materials
10 that it will produce in this case.

11 Cooper Tire's protective order, as I mentioned, has been
12 agreed to over the years many many times by Mr. Crosby. It
13 has been analyzed and adjudged to be appropriate for a
14 products case like this previously by this Court on more than
15 one occasion, both by agreement, and, when disputed, the South
16 Carolina State Courts have also determined this protective
17 order to be appropriate, and it's been determined to be
18 appropriate across the country.

19 It is the form of protective order, when it comes to the
20 two core provisions that we disagree about, as I understand it
21 from the briefing, with plaintiffs, it is the form of
22 protective order on those two provisions mandated by the South
23 Carolina Trade Secret Act.

24 Plaintiffs agree that Cooper Tire's trade secret
25 information is due protection. Cooper Tire, because this is

1 such a critical question, not only accepts that agreement, but
2 has provided all the evidence of record, unrebutted,
3 undisputed, establishing trade secret status for its
4 materials. And that would be the trade secret status pursuant
5 to South Carolina Statute 39-8-20(5), which defines a trade
6 secret. And for purposes of protection of my client, I will
7 simply recite that that statute identifies information,
8 including a number of enumerated categories that derives
9 independent economic value to Cooper Tire from not generally
10 being known to the public and not ascertainable by proper
11 means by the public, and is the subject of efforts that are
12 reasonable under the circumstances to maintain a secrecy.

13 We have established that by ECF No. 25-6, an affidavit.
14 It is not rebutted, it is not questioned in this case. And,
15 therefore, under the case law and under statutory law in this
16 state, Cooper Tire is due to have its information protected.

17 The governing law is found not only in the South Carolina
18 Trade Secret Act, which says that any confidential
19 information, quote, "must be governed by an appropriate
20 written protective order of the Court." But it says, further,
21 such information, quote, "may only be disclosed to persons
22 identified in the written protective order of the Court and
23 may be used or disclosed only in the action in which it is
24 protected. In the action in which it is produced. Litigation
25 sharing orders pertaining to trade secret information must not

1 be entered by the Court."

2 THE COURT: That's a state statute, so that really
3 doesn't govern Federal Court, right?

4 MR. WARBURTON: Well, I will take issue with that.

5 THE COURT: In the State Court action they're
6 governed by the -- we're under the Federal Rules of Civil
7 Procedure and we do federal discovery a little differently.

8 MR. WARBURTON: Yes, sir. However, of note very
9 recently, last week, the Fourth Circuit determined the
10 Hartsock, H-A-R-T-S-O-C-K, versus Goodyear case, in which this
11 question was presented. And the Fourth Circuit certified the
12 question over to the South Carolina Supreme Court. South
13 Carolina Supreme Court pronounced that there is indeed a trade
14 secret privilege, which is a qualified privilege.

15 THE COURT: Qualified privilege, right.

16 MR. WARBURTON: Yes, sir. And then the Fourth
17 Circuit reversed and remanded the decision of the District
18 Court, consistent with that opinion. So there is indeed
19 application in play of the State Court privileges and Trade
20 Secret Act.

21 THE COURT: The issue in that case was did the
22 privilege exist and was it either qualified or absolute.
23 Didn't have anything to do with the part of the statute that
24 says it can not be shared. Is that correct?

25 MR. WARBURTON: True. That specific provision.

1 THE COURT: What we're here for is do you want
2 Mr. Crosby to keep it and share it, or just keep it -- or you
3 don't want him to keep it or share it. He wants to keep it
4 and share it. And so isn't that what we're here for?

5 MR. WARBURTON: It is.

6 THE COURT: Okay.

7 MR. WARBURTON: To get to the core, no question.

8 THE COURT: And he doesn't contest that these are
9 trade secrets either.

10 MR. WARBURTON: He does not. And that is consistent.
11 Although --

12 THE COURT: Maybe not all of them, but most of them.

13 MR. WARBURTON: Although unwilling to agree to the
14 form of protective order here, Your Honor, and specifically
15 the two items that you've mentioned, Mr. Crosby and
16 plaintiffs' counsel have not contested the trade secret status
17 of the information to be produced.

18 THE COURT: At least they don't contest what you
19 think you have as trade secrets, and after they take a look at
20 them, they may or may not be trade secrets. I guess he has a
21 right to contest whether what you're saying is a trade secret
22 or not.

23 MR. WARBURTON: Under any protective order this Court
24 would enter, Your Honor, whether it be that preferred by
25 Cooper Tire, that preferred by plaintiffs or something

1 otherwise, I don't think there's any dispute that the routine
2 is as you've stated, which is Cooper Tire designates materials
3 upon production to be confidential under the protective order,
4 and then there is a provision within the protective order that
5 allows challenges, if felt necessary by plaintiffs.

6 Cooper Tire's protective order, when it comes to the two
7 core questions you've raised, Your Honor, the two points of
8 disagreement between these parties, is in line with this
9 District's form protective order.

10 First, dissemination, as you mentioned, the Court's form
11 confidentiality order explicitly prohibits distribution of the
12 confidential materials outside of the case. Cooper Tire's
13 protective -- proposed protective order, which, for your
14 reference is document 25-2 at paragraph seven, includes the
15 same or similar provisions.

16 And then on the second point, which is -- I suppose could
17 be called retention by counsel -- the Court's form protective
18 order at paragraph 10(b) requires return. Cooper Tire's
19 proposed protective order is consistent at paragraph 15.

20 Plaintiffs' counsel is basically seeking completely
21 unrestrained discretion to send Cooper Tire's undisputed trade
22 secrets to any other lawyer.

23 THE COURT: Well, that's part of it, but there --
24 actually he wants to keep it for his own cases, and not have
25 to reinvent the wheel for every one of Mr. Crosby's cases. He

1 wants to have the ability to give to other plaintiffs' lawyers
2 who have Cooper Tire cases, and wants to give it to NHTSA in
3 certain situations.

4 MR. WARBURTON: You're right. By way of summary, he
5 wants the discretion to send it to others, he wants to be able
6 to keep it himself. And those --

7 THE COURT: And use it in his other Cooper Tire
8 cases.

9 MR. WARBURTON: Keep it in his law firm for use
10 elsewhere, as he says, in other Cooper Tire cases. And that
11 would be in the nature of completely discretionary to him,
12 unfettered, even after this case potentially is long gone,
13 resolved either by way of settlement or trial. He proposed
14 that at his law firm for, I suppose his convenience sake, to
15 retain the property, the undisputed trade secrets of Cooper
16 Tire.

17 As you have mentioned, the Trade Secret Act is a State
18 Court -- is a state statute and was not tested in Hartsock,
19 but it is specific and it is, we would urge the Court, worth a
20 read in deference that because it says that dissemination and
21 retention of the type proposed by plaintiffs' counsel in a
22 protective order, quote, "must not be entered."

23 Cooper Tire's protective order, to cut to the chase of
24 sort of the convenience argument, and I believe with respect
25 to plaintiffs' arguments that they have submitted in their

1 briefing, it proves them hollow. Because over the past 15
2 years, approximately, counsel for plaintiffs, Mr. Crosby, in
3 cases with myself and others against Cooper Tire, has
4 repeatedly agreed to the entry of this protective order in
5 both Federal and State Courts. And each of these cases
6 proceeded without any protective order-related dispute or
7 difficulty, to include the matters of professional
8 responsibility that Mr. Crosby raises, to include any other
9 convenience-based arguments. These cases proceeded to
10 conclusion without a peep of a problem relating to the
11 protective order.

12 This Court has resolved, by way of my research, in a
13 Cooper Tire case, this issue once before, that is, in the
14 cases that were -- more than one case -- but the lead case was
15 Vera, V-E-R-A, and that was a 2014 case cited in our briefing
16 as a protective order litigated between Mr. Crosby, his firm
17 and plaintiffs on the one hand, and Cooper Tire on the other.
18 And as to the two provisions disputed before this Court,
19 dissemination and retention, the Court concluded that
20 plaintiffs' arguments in favor of dissemination and retention
21 were not well taken, and entered the provisions requested by
22 Cooper Tire.

23 THE COURT: You mean it was litigated, or just agreed
24 that they just have the regular confidentiality. I don't
25 remember ever having litigated this before.

1 MR. WARBURTON: Litigated, Your Honor. Motion to
2 enter opposed, argued, as I understand it, that -- I believe
3 that was argued by telephonic hearing and determined. And if
4 Your Honor please, that case number is 3:14 CV 00123.

5 Plaintiffs' requested order is legally unsupported. They
6 present a mish mash of arguments, some of which I've
7 discussed, and some of which I'll discuss now. They provide
8 no evidence, they provide no cite, no reference, no quote to
9 South Carolina law of any kind, to Fourth Circuit law or
10 District of South Carolina law at any time. There is no
11 explanation for the change in plaintiffs' counsel's past
12 agreement that the law requires entry of Cooper Tire's
13 protective order.

14 Why is plaintiffs' counsel opposing Cooper Tire's motion
15 in this case? It seems to be a desire to serve the interests
16 of plaintiffs' counsel and his law firm in sort of case
17 coordination and development. And it does not serve -- I
18 think it's an important thing to note that plaintiff counsel's
19 protective order does not in any way serve plaintiffs. This
20 is a case between two -- between parties, Cooper Tire on the
21 one hand, Ms. Moore and young minor Shack on the other hand.
22 And if plaintiffs' protective order were to be entered, it
23 would make plaintiffs' case against Cooper Tire no different.
24 This is a form of protective order requested by plaintiffs'
25 counsel to serve the interests of plaintiff counsel alone.

1 And as we have stated in our briefing, the Court is not
2 required to blind itself to the purposes for which a party
3 seeks information.

4 Further, to involve this Court, both during the pendency
5 of these cases and potentially after, in a supervision or a
6 source point, and thereby a forced supervision of Cooper
7 Tire's trade secret documents after this case is over, for an
8 unknown duration, goes too far.

9 As I've said, discovery is between parties. A case or
10 controversy is required. This Court is required to apply the
11 governing law to the facts of the case for this case, not for
12 whatever cases Mr. Crosby, or then another link in the chain,
13 another person after that seeks to export these documents.
14 The law is clear. We believe that the law mandates entry of
15 the protective order that Cooper Tire has proposed, and
16 nothing in any law or rule, federal or otherwise that this
17 Court is bound to apply, speaks to other cases or counsel
18 keeping documents for convenience. It will only make both
19 administrative and substantive trouble during this case and
20 after the case is closed.

21 In the end, plaintiffs' counsel give no compelling reason
22 to depart from the central common sense restrictions that are
23 found both in the Court's form confidentiality order, the
24 protective order to which Cooper Tire and plaintiffs' counsel
25 have agreed repeatedly, and the Vera protective order which

1 this Court determined, on dispute, was appropriate.

2 Unless the Court has further questions pointed to any
3 specific argument, I will thank you for your time, Your Honor.

4 THE COURT: Thank you.

5 Yes, sir, Mr. Crosby.

6 MR. CROSBY: Thank you, Your Honor, please the Court.

7 As an initial matter, the Vera court, the order that was
8 entered there was by consent. We had some conferences with
9 Judge Currie's clerk; Judge Currie did not rule on that. The
10 nonsharing and return of documents was something that I
11 ultimately agreed to. There was other provisions that Cooper
12 Tire was seeking to enforce, such as I could not even -- they
13 didn't want me to even load documents on my law firm's server.
14 And so we had issues, but that was never litigated.

15 THE COURT: That wasn't my case, that was Judge
16 Currie's case?

17 MR. CROSBY: It was Judge Currie.

18 THE COURT: Oh, good. I thought I'd forgotten it.

19 MR. CROSBY: As well as in the Lee case with Judge
20 Gergel, that was by consent. This issue has not been
21 litigated in this court. And I think Mr. Warburton was simply
22 mistaken as opposed to intending to misrepresent that to the
23 Court.

24 THE COURT: I'm sure.

25 MR. CROSBY: At the outset, the Trade Secrets Act has

1 little or nothing to do with this. I would posit to the Court
2 that this entire argument relying on the Trade Secrets Act has
3 nothing to do here. These documents will not rise to the
4 level of trade secrets.

5 We asked for two categories of documents that could rise
6 to the level of trade secrets. That would be the compound
7 formula for the tire and the halobutyl content for the inner
8 liner. Cooper Tire has put a huge objection to that, citing
9 the Laffitte versus Bridgestone case, which is a case that I
10 was involved in that the South Carolina Supreme Court dealt
11 with that specific issue of trade secrets, as did the Hartsock
12 case. That was what was at issue there, was a compound form
13 that Judge Duffy had ordered Goodyear to turn over.

14 While I don't have these documents, I've seen many of
15 them. Cooper Tire has refused to produce anything that they
16 really consider a trade secret. So I just want to clear that.
17 That is not what we're talking about. We're talking about
18 ordinary confidential documents that I agree should be subject
19 to a protective order, but -- And just to jump to the real
20 reason here, it's not in the interests of plaintiffs' counsel.
21 While almost every major corporation that I have litigation
22 pending, General Motors, Ford, Bridgestone, Michelin, you
23 know, just name them, and the companies have a similar type of
24 protective order that we have here, where if there is -- that
25 we're advocating for -- if there is something that a trade

1 secret shown, that that could never be shared, it would always
2 be returned. But these confidential records, I was trying to
3 think last night how many I probably had, and this is
4 literally, you know, millions of manufactured documents that
5 I've retained over the years with no problem.

6 And what it does, in this repeat litigation where we're
7 asking for the same documents over and over, it stops from
8 having to come here. We had to file motions to compel in the
9 Lee case. I recently filed one this the Anderson case, likely
10 in the Senseney case that's pending up in Florence County,
11 we'll probably end up with that. And what it does is gets rid
12 of that necessity to continually have discovery practice where
13 we're having to come back and ask for the same documents over
14 and over and this fight over and over. And it takes up the
15 Court time. And very well it -- this is the perfect type of
16 case for an order that has a nonreturn of documents, and
17 sharing provisions with other cases. Because we're asking for
18 basically the exact same documents in each one of these cases.
19 And we're having to put time and effort, sometimes in -- for
20 example, just recently in the Anderson case, all the -- I
21 think the case was filed two years, and probably three years
22 into the case before I actually got documents, the same
23 documents that were at issue in a case with Judge Harwell that
24 were produced up in a case called Stotler, and cases I've
25 cited in our memorandum. It just isn't as easy as they make

1 it out to be. We file a case, although they know I know what
2 the documents are, we're talking about by and large a lot of
3 documents, as I pointed out in our memorandum, that were first
4 produced pursuant to an order of Judge Perry Buckner, a
5 Circuit Court Judge, back in the early 2000s. I mean, some of
6 these documents that are just -- that's how old they are, but
7 they're still relevant to the tire at issue in this litigation
8 and other litigation.

9 And I say this as just totally something that's within the
10 Court's discretion. If the Court does not find our arguments
11 compelling on the nonreturn and sharing -- and on the sharing
12 side, the order that we proposed had a notice provision
13 whereby Cooper Tire would receive notice, and they could
14 certainly object if they did not want -- did not think those
15 documents appropriately shared with other counsel with Cooper
16 Tire cases.

17 But if there is a situation where this Court is going to
18 approve of a sharing provision and a nonreturn of documents so
19 they can be used in other cases, this is the case for that.
20 Because there's currently other cases pending in South
21 Carolina where these same documents have been requested, and
22 you can see from the history there, this has been going on for
23 15 years, and here we're still arguing about these.

24 And the reason I changed my position is because I simply
25 become fatigued.

1 THE COURT: Had all the fun you can take?

2 MR. CROSBY: I've had all the fun I can take. It's
3 not as easy as they make it seem. It really does add to the
4 cost. And where it benefits -- it may not be the direct
5 benefit here to Miss Shack and Miss Moore, but in other cases
6 it certainly will benefit both the plaintiffs and the courts
7 by not having to deal with these issues.

8 And there's certainly no indication that I would ever do
9 anything to disclose to some outside entity or improperly
10 handle these documents because, I mean, I filed an affidavit
11 in that Vera case with Judge Currie on that very issue,
12 because they were challenging the security of -- and I think
13 that may have been decided, but I think it was more through
14 Judge Currie does a lot of things through her law clerk with
15 conferences, where she pretty much telegraphs what she's going
16 to do.

17 But I don't really have anything else to add to that, Your
18 Honor. Certainly, you know, it's within your discretion. And
19 if the Court denies our request for these provisions which
20 basically modify the standard form order that District Court
21 here in South Carolina has used, I would ask the Court to
22 enter the standard order, not Cooper Tire's. Because notably,
23 Cooper Tire's order does not contain what South Carolina has
24 long required, is that an attorney of record sign off saying
25 that these documents are indeed confidential. Because I know

1 for certain that many of the documents that we're talking
2 about have been entered in litigation in other cases, and
3 would have likely lost their -- any confidential status, once
4 they were put in the litigation.

5 So at a minimum, if the Court denies our request to amend
6 the District Court scheduling order -- I mean protective
7 order -- I would ask that you enter -- that the Court enter
8 our standard order, at a minimum.

9 Unless you have any other questions.

10 THE COURT: That's fine.

11 MR. WARBURTON: Very briefly, Your Honor?

12 THE COURT: Sure.

13 MR. WARBURTON: Number one, I hope it is obvious to
14 the Court that while there is a disagreement regarding the
15 pending motions, Mr. Crosby and I get along. And he is
16 correct that I in no way intended to give you wrong
17 information regarding the Vera case. That is indeed the
18 product of the conversations with Judge Currie's law clerk in
19 which a description of the Court's intended rulings was given,
20 as well as a follow on telephone conference with Judge Currie
21 in which she told the parties what she was willing to do. And
22 that was my description of those oral pronouncements, both
23 from the Court and its staff.

24 THE COURT: That's fine, no problem. I'm just glad I
25 didn't forget it.

1 MR. WARBURTON: Second, so that it is ultra clear and
2 there aren't any mistaken understandings, I have the Fourth
3 Circuit's Hartsock opinion, which it issued May 24, 2018 in
4 the case numbered 16-1172. And they say specifically, they
5 being the Fourth Circuit, specifically says that the question
6 before them which they referred to the South Carolina Supreme
7 Court, was whether South Carolina underlying statutory law
8 applied is applicable in the federal proceeding in the
9 District of South Carolina, as to this disputed trade secrets
10 in that case.

11 And the Fourth Circuit explained that an affirmative
12 answer to that question, quote unquote, would say yes. And,
13 therefore, the South Carolina Trade Secret Act does apply to
14 the dispute before this Court on the protective order. It is
15 not the provision of the Trade Secret Act debated or disputed
16 in the Hartsock opinion. But it is indeed an affirmative
17 answer out of the Supreme Court of South Carolina, followed
18 and now enforced -- or applied by reversal, vacating the
19 decision of the District of South Carolina and remand last
20 week on the 24th.

21 Finally, I think Mr. Crosby is mistaken when he represents
22 to the Court that there is some dispute or there is some
23 question regarding the documents' trade secret and
24 confidential status. And what he said was, the way I heard
25 it, that I or counsel for Cooper Tire somehow, quote, know

1 that the documents have been -- have lost their trade secret
2 status by virtue of introduction into evidence.

3 And that is precisely the argument against which we move
4 for protective order in this case. Because if the protective
5 order is entered, it is in the preservation of that
6 confidential status, it is in the preservation of that trade
7 secret status, and it will work ultimately the way it worked
8 in the Toe versus Cooper Tire case, which plaintiffs have
9 attempted to apply for this point. They say in their brief
10 these documents were entered into evidence in Toe, in Iowa,
11 and so, therefore, they can not be trade secrets. Well, that
12 is exactly the opposite of what the Court presiding over the
13 Toe matter concluded. The Court in Toe held specifically that
14 the documents retained their trade secret protections through
15 and after trial, because, quote, "they are research and
16 manufacturing documents created by Cooper Tire in the
17 manufacturing process which Cooper Tire spent money to create
18 and to protect from public dissemination and which could
19 provide an advantage to one of Cooper Tire's competitors if
20 they came into their possession," close quote.

21 It is undisputed, there is no evidence to the contrary, no
22 matter how many small digs and arguments occur in this case,
23 that the documents at issue are trade secrets. We have
24 established that by affidavit by competent evidence before the
25 Court, which is unimpeached and unrebutted. And when they

1 are -- when they are proven to be trade secrets, as we have
2 done, the Court is bound by governing law, both federal and
3 state, to enter a protective order on these two specific
4 debated points, restricting the documents to this case, to the
5 parties before it. And when the case is over and their use is
6 no longer needed in this litigation for purposes of the
7 parties' proof, they are to be returned so that there is no
8 damage to their trade secret status simply by defending one's
9 self in Federal Court in this case.

10 We respectfully request that the Court enter the
11 protective order that we have proposed.

12 THE COURT: What's the matter with the Court's
13 generic protective order?

14 MR. WARBURTON: I would say the biggest issue with
15 the form protective order is that it would require us to --
16 Mr. Crosby is right, we don't want to bother the Court with
17 little ticky tack discovery things. And if that standard
18 protective order were entered in this case, it could
19 potentially lead to just that on this point. Laffitte and
20 other applicable law shields formulas and the like from any
21 discovery whatsoever in civil litigation such as this. And
22 the parties, over the years, have had no issues with Cooper
23 Tire's extremely limited redaction of those core trade secrets
24 out of the documents as they're produced.

25 And my reading, and you can tell me if I'm wrong, Your

1 Honor, but my reading is for every redaction, a necessitated
2 motion to seal or motion to redact would need to be filed.

3 The protective order proposed by Cooper Tire, for certain,
4 allows for redactions. And if there is an issue in redaction
5 occurring, the plaintiffs' counsel would follow the ordinary
6 course of contesting designation or redaction. And so --

7 THE COURT: Sound to me like I'm going to have to
8 decide it either way.

9 MR. WARBURTON: Well, I'll say for myself, I don't
10 necessarily think so, because I've never had that issue with
11 Mr. Crosby. Mr. Crosby has never, in my cases, taken issue
12 with a single redaction. And so -- and I hazard a guess that
13 the Laffitte decision is on point, it is the law of this
14 state, and it provides complete immunity from discovery for
15 rubber formula. It is a products liability tire case just as
16 this one where the plaintiffs pled design manufacturing
17 defect, and the Court has said that that is immune from
18 discovery. And it is out of that vein of the law that
19 Hartsock grew. I'll take Mr. Crosby's description of that
20 case for fact, that there was a dispute on behalf of Goodyear
21 relative to a formula production, and they likely contested
22 that and said Laffitte says no. And the District of South
23 Carolina said, well, I'm not so sure. And that ultimately
24 yielded the certified question over to the South Carolina
25 Supreme Court, answered in the affirmative, and now applied by

1 the Fourth Circuit to the case that's been remanded to the
2 District Court.

3 Thank you, sir.

4 THE COURT: Thank you. Anything else, Mr. Crosby?

5 MR. CROSBY: Your Honor, only to point out that
6 there's a huge difference between trade secrets -- and I think
7 Mr. Warburton just -- he called core trade secrets, and then
8 he's trying to call everything else. I can tell you, they
9 have never claimed trade secret status over the documents that
10 they will produce here, other than some redactions where they
11 may have taken out some things.

12 It's a bit of a conflated argument here to be pointing to
13 this trade secret. There's a strict burden that has to be --
14 that a company has to go through to prove a trade secret.
15 They filed this affidavit. We don't have those precise
16 documents here. But there's just two different things going
17 on. One is ordinary confidential business records like you
18 see in every products liability case that are produced. They
19 produced in every, you know, case eventually, in trade
20 secrets. So I just -- I didn't anticipate that we'd be down
21 here calling every document as produced a trade secret,
22 because that's just simply not the case. We're talking about
23 manufacturing tolerances, you know, specifications, you know,
24 stuff that could actually be reverse engineered, you can go
25 out and pretty much measure what's there.

1 So that's the only point I'd make, that there are two
2 separate things here. And if there was indeed a trade secret
3 that I was pushing to be produced, which I don't believe,
4 given the status of the tire in this case, that we intend to
5 produce -- pursue any compound formula, although there's not a
6 complete immunity, as was argued, under the Laffitte case.
7 The Court spelled out a higher standard under Laffitte case
8 for obtaining company trade secrets. It wasn't that it's
9 immune. But I don't believe we're going to be even seeking
10 any compound formula in this particular case. At this
11 junction. Of course, I haven't seen all the documents and
12 stuff yet.

13 But I don't have anything else to add, Your Honor.

14 THE COURT: Okay. Your motion is the next motion.

15 MR. CROSBY: Your Honor, I don't -- there's not
16 really a whole lot to say. It's not in our briefing because I
17 tend to, you know, take responsibility no matter what. You
18 may remember I tried a case before you a couple years ago
19 called Wickersham. My paralegal that was here with me, Miss
20 Gent, who has been my paralegal for a long time, right after
21 that case, went out with a serious heart condition. And
22 needless to say --

23 THE COURT: That's because of the size of the verdict
24 you got.

25 MR. CROSBY: Unfortunately, she has seen some bigger

1 than that. Fortunately, she's seen some better than that.
2 But -- and, you know, I think what it did is -- and I didn't
3 put it in the briefing because I wouldn't want her to have any
4 stress from that, because she just came back to work,
5 fortunately. But it makes you appreciate --

6 THE COURT: How much you miss them?

7 MR. CROSBY: Yeah, your staff. And I had not only,
8 in 25 years I've only missed two deadlines, this being one,
9 and one right after she went out as well, with Judge Harwell
10 in another products liability case.

11 I don't have anything much to say about it. It is my --
12 it's my mistake, it's nothing on my client. I don't think
13 there's any prejudice to anyone by amending that. I produced
14 our accident reconstruction report yesterday, as well as our
15 vehicle dynamics expert report. We still need to get
16 documents from Cooper Tire so that we can complete our tire
17 forensics report. And, you know, somewhere along the way,
18 when we first talked about this protective order issue back
19 in -- last fall, when we amended it, the scheduling order.
20 And it's typically that the person seeking a protective order
21 will file a motion, and somehow that did not get done, and I
22 don't know, it didn't trigger me and it didn't -- it didn't
23 get in our system correctly with that amended scheduling
24 order. And obviously I was operating under the impression
25 that our deadlines had not gotten there. And I don't know,

1 nothing I can say, but we made a mistake, and I would just ask
2 the Court in its discretion to amend the scheduling order and
3 allow us to get the case back on track. I don't believe
4 there's any prejudice to anyone here.

5 MR. WARBURTON: Your Honor, I have no interest in
6 belaboring this motion either. And so we would simply direct
7 the Court to the papers before it.

8 I will say that there has been a sustained and multiple,
9 from our perspective, attempt, using different components, to
10 resolve not only the schedule issue before this Court, but the
11 protective order issue before this Court. And we have been
12 unsuccessful. We believe that we've made some very realistic,
13 very actually heavily compromised proposals to plaintiffs'
14 counsel, but those are not accepted.

15 And we have also gone to the length of proposing a
16 potential route of resolution in our papers in response to
17 plaintiffs' motion. So would respectfully direct the Court
18 there in its discretion in resolving this other matter.

19 THE COURT: Okay. I mean, certainly you would agree
20 that Mr. Crosby probably could not have named an expert
21 witness to testify in this case until he received Cooper
22 Tire's documents.

23 MR. WARBURTON: Well, it is done all kinds of
24 different ways, and it has been done all kinds of different
25 ways by Mr. Crosby, both in Federal and State Court. He has

1 produced full reports from the gentleman he has identified,
2 Mr. Troy Cottles, before document productions by Cooper Tire
3 and after. And so I don't think you find the full concession
4 there, Your Honor. But don't read that argument to mean that
5 I reject out of hand the issue. I think we've been, speaking
6 for myself and co-counsel, we've been very giving on this
7 question, but have found no forthcoming compromise from
8 plaintiffs' counsel.

9 THE COURT: All right. Assuming that I extended the
10 scheduling order, when will y'all be ready to try this case?
11 I'm not pushing. Next year?

12 MR. WARBURTON: I'll say this, and I would expect
13 Ronnie would probably agree with me. I think that if and when
14 the Court resolves the two motions before it and indicates
15 which way it's going, first the protective order, that's that.
16 But then if the Court indicates an inclination one way or the
17 other on the schedule, we can then be counted on to work
18 together and put together some proposed deadlines for you.

19 THE COURT: Okay. I think --

20 MR. CROSBY: Your Honor, just for the Court to
21 understand, it's not that I've been difficult to deal with on
22 this issue, but we tie a lot of stuff together, and I've just
23 always been a believer that I can't correct my mistake, you
24 know, negotiating over using that, and I'm not saying that
25 they were trying to put me in that position, but when it's all

1 tied together, I just don't think that's appropriate for me to
2 do, and that's why I have not been able to agree.

3 THE COURT: And it's all tied together, and like
4 Alexander the Great, you just slash the Gordian knot, right?
5 That's what my job is.

6 MR. CROSBY: Yes, sir. Obviously, barring attorney
7 schedules, the case could be ready late this year.

8 THE COURT: I was thinking next year.

9 MR. CROSBY: Knowing how things are. I think you've
10 got me in your next term with a case to try, and --

11 THE COURT: I was thinking the first part of next
12 year.

13 MR. CROSBY: Probably would be more realistic.

14 MR. WARBURTON: We've had a lot of success over the
15 years, while we disagree on substance here and there and get
16 into hot depositions and all that, we take care of each
17 other's schedules.

18 THE COURT: As a matter of history, do not try a
19 products case with Mr. Crosby in August.

20 MR. WARBURTON: I'd rather not try a case in this
21 town in August with anyone.

22 THE COURT: I've had -- last two summers I've had
23 have been August, and it's been very bad for the defendants.
24 So just a word to the wise. So I'll exempt you from any
25 August trials no matter when.

1 MR. CROSBY: Looks like we'll be back in this August
2 in one.

3 THE COURT: All right. I think right now, since law
4 is changing, and I'll have to look at the Hartsock case, I
5 read it last week when it came out. I'm going to impose the
6 Court's standard confidentiality order in the discovery of
7 this case. At the end of the case, when -- just to get it
8 moving. I'm not deciding whether they're going to have any
9 sharing, either in house or out of the house right now. I can
10 do that at the end of the case or when the case is over with.
11 I mean, the issues are what the issues are, once you've gotten
12 the documents and you can talk about confidentiality and trade
13 secrets and all that. So I'll take that part of it under
14 advisement. But right now, to get the case going, we'll just
15 do the Court's standard confidentiality case, and if we need
16 to tweak it, y'all just give me a call and let me know.

17 I also grant the motion to extend the scheduling order,
18 set the case for the first part of first quarter of 2019, and
19 back your deadlines up from there; how's that sound? Give you
20 enough guidance?

21 MR. WARBURTON: Understood.

22 THE COURT: So I'm not deciding, you know, in the
23 classic I'm avoiding the issue, which is -- that's Rule 1.
24 But I think it's an important issue. And my own philosophy, I
25 agree with Joe Anderson, you know, in that article that he

1 wrote in 2004. I mean, Joe and I were classmates, he was
2 number one in my class, I was way behind him, he's always been
3 smarter than I am. But I think it's a serious public policy
4 consideration too, when there's things out there, and I'm not
5 saying there is in this case, that can harm the public from a
6 repetitious -- and like, for example, maybe the Ford exploding
7 gas cases, they covered that up for a long time and a lot of
8 people died and got injured for that. So there's a public
9 policy something at play. Also understand that cases are
10 between plaintiffs and defendants, and they ought to stay in
11 the same thing. So it goes both ways.

12 But I think I'm going to take a look at the Hartsock case
13 and the other cases, and if I change my mind, then I'll let
14 y'all know and I'll let y'all argue it again; how's that
15 sound?

16 MR. WARBURTON: Yes, sir. And we'll reserve on that
17 redaction question until you give us --

18 THE COURT: Yeah, the redaction question, if it
19 becomes a problem, then give me a call, we'll talk about the
20 problem. Right now it's theoretical. So when it gets real,
21 let me know.

22 MR. WARBURTON: Yes, sir.

23 THE COURT: Okay. Thank you very much.

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25 (Court adjourned at 10:55 a.m.)

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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR